Supreme Court, U.S.
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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 47 U.S.C. 253(a), which provides that "[n]o State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service," preempts a state law prohibiting political subdivisions of the State from offering telecommunications service to the public.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America. The State of Missouri, which intervened in the court of appeals, has separately filed a petition for a writ of certiorari. Southwestern Bell Telephone Co. also intervened below. The Missouri Municipal League, Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Sikeston, Missouri, Columbia Water & Light, and the American Public Power Association were the petitioners in the court of appeals, and are respondents here. The National Association of Telecommunications Officers and Advisors and the United Telecom Council participated as amici in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 299 F.3d 949. The decision of the Federal Communications Commission (App., *infra*, 14a-45a) is reported at 16 F.C.C. Rcd 1157.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2002. A petition for rehearing was denied on November 20, 2002 (App., *infra*, 46a). On February 10, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 20, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253 of the federal Communications Act of 1934, 47 U.S.C. 253, and Section 392.410(7) of the Annotated Statutes of Missouri (West Supp. 2003), as amended, are reprinted in an appendix to this petition. App., *infra*, 47a-49a.

STATEMENT

1. For most of the twentieth century, the provision of local telephone service in the United States "was thought to be a natural monopoly," and "States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC)." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress sought to end "this longstanding regime of state-sanctioned monopolies," *ibid.*, when it enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, and "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1756 (2002).

Section 253 of the 1996 Act furthers the statute's design of fostering competition in local markets by abolishing all state exclusive-franchise laws. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement,

may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). The statute further provides that "[i]f * * * the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) * * *, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. 253(d). The Federal Communications Commission (FCC or Commission) has executed that directive by, for example, preempting the enforcement of a state statute that shielded rural incumbent telephone carriers from competition by other private providers of local telephone service. See *Silver Star Tele. Co.*, 12 F.C.C. Rcd 15,639 (1997), recons. denied, 13 F.C.C. Rcd 16,356 (1998), aff'd *sub nom. RT Communications, Inc.* v. *FCC*, 201 F.3d 1264 (10th Cir. 2000).

2. The FCC's decision in this case relied heavily on an earlier decision involving a similar state statute. In *In re Public Utility Commission*, 13 F.C.C. Rcd 3460 (1997), the FCC addressed a petition by Texas municipalities (but not municipally owned utilities) that urged the Commission to use its authority under Section 253(d) to hold preempted a number of provisions of Texas law that were alleged to violate Section 253(a). One challenged provision "generally prohibit[ed] municipalities or municipally-owned electric utilities from offering for sale, directly or indirectly, certain telecommunications services." 13 F.C.C. Rcd at 3540. Limiting its ruling to the application of the state statute to municipalities themselves (rather than municipally owned utilities), *id.* at 3543, the Commission found that

"preempting the enforcement of [the challenged provision] would insert the Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Id.* at 3544.

The Commission explained that the challenged law "is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions," and that this Court's decision in *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), held that such "fundamental state decisions" remain within the State's authority "absent a clear indication of intent." 13 F.C.C. Rcd at 3545-3546. In reaching that conclusion, the Commission distinguished "the question of whether federal standards may be applied to an arm of a Texas municipality," which would not be subject to the *Gregory* v. *Ashcroft* rule, from the question whether the State may "define the scope of the authority delegated to a state's own political subdivisions," which is subject to the *Gregory* v. *Ashcroft* rule. *Id.* at 3546. Applying that rule to Section 253(a), the Commission was unable to find that the use of the term "any entity" in Section 253(a) constituted a sufficiently clear statement that Congress specifically intended to include municipalities within the scope of Section 253(a) preemption and thereby intrude into the scope of authority that a State may delegate to its own political subdivisions. *Id.* at 3546-3549.

Although ruling that the Texas statute was not preempted, the Commission "encourage[d] states to avoid enacting absolute prohibitions on municipal entry into telecommunications," because "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." 13 F.C.C. Rcd at 3549. The Commission acknowledged

"that entry by municipalities * * * may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias." *Ibid.* But the Commission stated its belief "that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry." *Ibid.*

In *City of Abilene* v. *FCC*, 164 F.3d 49 (1999), the D.C. Circuit affirmed the FCC's decision. The court agreed with the FCC that "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*," because "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *Id.* at 52. The court accordingly held that it must "be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services" before Section 253(a) may be applied to do so. *Ibid.* The D.C. Circuit concluded that "it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category 'any entity.'" *Id.* at 54. Accordingly, the D.C. Circuit agreed with the Commission that Section 253(a) does not preempt the Texas statute.

3. This case involves a Missouri statute similar to the statute at issue in *City of Abilene*. The Missouri statute provides that "[n]o political subdivision of this state shall provide or offer for sale * * * a telecommunications service," with exceptions for, *inter alia*, "Internet-type services." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003).[1] A number of Missouri

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[1] The statute as originally enacted was scheduled to expire in August 2002. The Missouri General Assembly subsequently

municipalities, municipal organizations, and municipally owned utilities filed a petition with the FCC seeking an order that the Missouri statute is preempted under Section 253(a). The FCC denied the petition. App., *infra*, 14a-45a.

Relying on its own decision in the Texas case and the D.C. Circuit's subsequent affirmance in *City of Abilene*, the Commission noted that the case presented "a fundamental issue concerning the relationship between a state and its political subdivisions." App., *infra*, 27a. The Commission accordingly again applied the *Gregory* v. *Ashcroft* plain statement rule. *Id.* at 19a. As in the Texas proceeding, the Commission was unable to conclude that either the use of the term "any entity" in Section 253(a) or the legislative history of Section 253(a) is sufficient to make clear Congress's intent to preempt the State's authority to control its political subdivisions. *Id.* at 29a-30a ("any entity"), 35a-37a (legislative history). Accordingly, the Commission concluded that "the term 'any entity' in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation." *Id.* at 22a. The Commission generally extended that ruling to municipally owned utilities because it found no evidence "that municipally-owned utilities are not considered to be political subdivisions in Missouri." *Id.* at 32a-33a. The Commission noted, however, that "if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, [the Commission] could

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extended the statute's effectiveness until August 2007. Mo. Ann. Stat. § 392.410(7) (West Supp. 2003).

reach a different result under section 253(a)." *Id.* at 38a.

Although it held the Missouri statute not preempted, the Commission again urged, as a policy matter, "that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service," because "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." App., *infra*, 23a; see *id.* at 42a-43a (separate statement of Chairman William E. Kennard and Commissioner Gloria Tristani), 43a-44a (separate statement of Commissioner Susan Ness).

4. The Eighth Circuit reversed the FCC's determination that Section 253(a) does not preempt the Missouri statute. App., *infra*, 1a-13a. The court of appeals, like the Commission, held that the plain statement rule of *Gregory* v. *Ashcroft* "applies in this case," and "requires [the court] to determine whether the statutory language plainly requires preemption." *Id.* at 6a, 7a. The court disagreed, however, with the Commission's application of that rule to the term "any entity" in Section 253(a).

The court held that "the words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule" as used in Section 253(a). App., *infra*, 7a. The court noted that municipalities fall within the ordinary definition of the term "entity," *id.* at 8a (citing *Black's Law Dictionary* 553 (7th ed. 1999)), and asserted that the appearance of the modifier "any" "signifies [Congress's] intention to include within the statute *all* things that *could* be considered entities," *id.* at 8a-9a (emphasis added). For that proposition, the court relied principally on *Salinas* v. *United States*, 522

U.S. 52 (1997). In *Salinas*, this Court held that the federal bribery statute, which prohibits acceptance of bribes "in connection with any business transaction" by an agent of any organization that receives federal funds, does not require proof that the bribe had an effect on the federal funds. *Id.* at 56-57. In reaching that conclusion, the Court stated that "[t]he plain-statement requirement articulated in *Gregory* * * * does not warrant a departure from the statute's terms," because "[t]he text [of the federal bribery statute] is unambiguous on the point under consideration here." *Id.* at 60. In the Eighth Circuit's view, "*Salinas* held that by using the clearly expansive term 'any,' Congress expressed its intent to alter th[e] [federal-state] relationship." App., *infra*, 12a.

The court of appeals acknowledged that its decision conflicted with the D.C. Circuit's decision in *City of Abilene*. The Eighth Circuit declined to follow the D.C. Circuit because it "d[id] not find *City of Abilene* to be persuasive." App., *infra*, 11a. The court of appeals accordingly vacated the FCC's decision and remanded the case to the agency for further proceedings. *Id.* at 13a.

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit holding that Section 253(a) preempts a state statute barring the State's political subdivisions from providing telecommunications services directly conflicts with the decision of the D.C. Circuit in *City of Abilene*. While the Eighth Circuit has held that Section 253(a) requires the Commission to find that such state laws are preempted, the D.C. Circuit has held that Section 253(a) precludes any such finding. As a result of the two decisions, the Commission must follow conflicting decisions of two courts

of appeals when executing its congressionally delegated responsibilities under Section 253. Yet, under the federal venue statute, the Commission has no way to predict in advance whether its decisions will be subject to review in the D.C. Circuit or a regional court of appeals. The conflict is further sharpened by decisions of the highest courts of two States within the Eighth Circuit, which have themselves divided on the question presented in this case, with one agreeing with the Eighth Circuit's decision in this case and the other agreeing with the D.C. Circuit's decision in *City of Abilene*. The question presented can be expected to arise again, because a number of States currently have similar statutes that may be subject to attack under Section 253(a), and still other States may enact such statutes in the future. Further review is therefore warranted.

1. Section 253(a) requires preemption of state laws that "prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a) (emphasis added). The question presented is whether the term "any entity" includes political subdivisions of the State, so that Section 253(a) preempts state laws prohibiting their own political subdivisions from providing telecommunications services.

If "any entity" in Section 253(a) includes political subdivisions, then State laws prohibiting their political subdivisions from providing telecommunications services are preempted. The Eighth Circuit recognized, as did the Commission and the D.C. Circuit in *City of Abilene*, that such preemption would "affect[] the traditional sovereignty of the states." App., *infra*, 6a. The court accordingly held that Section 253(a) may be read to preclude such state laws only if "the words 'any

entity' plainly include municipalities and so satisfy the *Gregory* [v. *Ashcroft*] plain-statement rule." *Id.* at 7a.

The Eighth Circuit diverged from the Commission and the D.C. Circuit in its application of the plain statement rule to Section 253(a). The Eighth Circuit concluded "that because municipalities fall within the ordinary definition of the term 'entity,' and because Congress gave that term expansive scope by using the modifier 'any,' individual municipalities are encompassed within the term 'any entity' as used in § 253(a)." App., *infra*, 11a-12a. The court accordingly held that the plain-statement rule is satisfied, and that state laws prohibiting political subdivisions from providing telecommunications services are preempted. Accord *City of Bristol* v. *Earley*, 145 F. Supp. 2d 741, 746-750 (W.D. Va. 2001) (adopting same position as Eighth Circuit in this case).

In *In re Lincoln Electric System*, 655 N.W.2d 363 (2003), the Supreme Court of Nebraska reached the same conclusion as did the Eighth Circuit in this case. In *Lincoln Electric System*, a municipal utility appealed the denial by a state regulatory commission of its application to provide contract carrier telecommunications services. The Nebraska Supreme Court, after reviewing the various decisions in the area (including the Eighth Circuit's decision in this case and the D.C. Circuit's decision in *City of Abilene*) stated that it was "persuaded by the reasoning of the Eighth Circuit that * * * Congress' use of the phrase 'any entity' in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services." 655 N.W.2d at 371-372. The court concluded that state statutes prohibiting munici-

palities from providing telecommunications services "are preempted by federal law." *Id.* at 372. [2]

2. Like the Eighth Circuit in this case, the D.C. Circuit in *City of Abilene* recognized that "§ 253(a) must be construed in compliance with the precepts laid down in *Gregory* v. *Ashcroft*." 164 F.3d at 52. But the D.C. Circuit reached a different conclusion than the Eighth Circuit regarding the outcome of that plain statement test. Unlike the Eighth Circuit, the D.C. Circuit concluded that "it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category 'any entity.'" *Id.* at 54. On that basis, the court affirmed the Commission's decision that Section 253(a) does not preempt a Texas statute that prohibited municipalities from providing telecommunications services. See *ibid.* Accord *Municipal Elec. Auth.* v. *Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399 (Ga. Ct. App. 1999) (agreeing with *City of Abilene*), cert. denied, No. S00C0601 (Ga. May 1, 2000).

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[2] Having "concluded that [the municipal utility] is not *prohibited* by state law from" providing telecommunications services, the Nebraska Supreme Court in *Lincoln Electric System* went on to examine "whether [the municipal utility] is *authorized* to do so." 655 N.W. 2d at 372. Ultimately, the court concluded, however, that the city itself had not properly delegated to the municipal utility authority to provide telecommunications services, and that the municipal utility was accordingly precluded from offering such services on that ground. See *id.* at 376-377. But the court's determination that the state laws at issue in that case "are preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution," *id.* at 377, nonetheless can be expected to govern future Nebraska cases in which either a municipality itself or a municipally owned utility that has received a proper delegation of authority seeks to provide telecommunications services.

In *Iowa Telephone Ass'n* v. *City of Hawarden*, 589 N.W.2d 245 (1999), the Supreme Court of Iowa also held that Section 253(a) does not apply to municipalities. In that case, an association of telecommunications providers sought a declaratory ruling that a state statute prohibited a city from providing local telephone service. The Iowa court held that Section 253(a) "does not prevent the State of Iowa from prohibiting the offering of local telephone service by its political subdivisions." *Id.* at 252. The court noted that it therefore "agree[d] with" the conclusion reached by the D.C. Circuit in *City of Abilene*. *Ibid.*[3]

3. The decisions of the Eighth and D.C. Circuits are in clear conflict. Both Circuits—along with the Nebraska and Iowa Supreme Courts—applied the plain statement rule of *Gregory* v. *Ashcroft* to Section 253(a). The Eighth Circuit (along with the Supreme Court of Nebraska) held that the term "any entity" plainly includes political subdivisions. By contrast, the D.C. Circuit (along with the Supreme Court of Iowa) held that the term "any entity" does not include political

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[3] The city in *Iowa Telephone Ass'n* already operated a cable television system. For that reason, having ruled that the Iowa law is not preempted by Section 253(a), the court went on to rule that it is preempted by another provision of the 1996 Act that precludes "any requirement * * * that has the purpose or effect of prohibiting * * * the provision of a telecommunications service *by a cable operator*." 47 U.S.C. 541(b)(3)(B) (emphasis added). In reaching that conclusion, the Supreme Court of Iowa noted that Section 541(b)(3)(B) "differs in a fundamental way from § 253(a)." 589 N.W.2d at 253. Accordingly, although the result in *Iowa Telephone Ass'n* was that the state law as applied to the particular municipal cable operator was preempted, the court's holding that Section 253(a) generally does not preempt the state statute will preclude other municipalities in Iowa from providing telecommunications services.

subdivisions. Whereas the Eighth Circuit has held that the FCC must find that a state law prohibiting political subdivisions from providing telecommunications services is preempted under Section 253(a), the D.C. Circuit has affirmed the FCC's determination that a state law prohibiting political subdivisions from providing telecommunications services is not preempted under Section 253(a).

The D.C. Circuit's construction of Section 253(a) is the better view. The term "entity" "bears different meanings depending upon the context." *Southern Co. Servs., Inc.* v. *FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002).[4] Its use in Section 253(a) accordingly cannot be taken to be a plain statement that Congress intended to refer to political subdivisions of a State, where the effect of such a reference would be to interfere in the State's division of powers between itself and its political subdivisions. Moreover, recent decisions of this Court have reinforced the conclusions that a State's allocation of power to its political subdivisions "is a question central to state self-government," *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002), and that the use of a modifier such as "any" is not sufficient to satisfy the *Gregory* plain statement standard, see *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 542-546 (2002).

4. The conflict in the circuits creates a particular problem for the FCC. By enacting Section 253(d), Con-

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[4] The D.C. Circuit, for example, has held the term "entity" ambiguous in two other distinct contexts involving the 1996 Act. See *Southern Co. Servs.*, 313 F.3d at 580 (term "entity" in 47 U.S.C. 224 "bears different meanings depending upon the context"); see also *Alarm Indus. Communications Comm.* v. *FCC*, 131 F.3d 1066, 1068-1072 (D.C. Cir. 1997) (finding term "entity" ambiguous as used in 47 U.S.C. 275).

gress delegated to the FCC authority to determine whether a law is preempted. See 47 U.S.C. 253(d) ("If * * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) * * * of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."). The FCC's decisions, however, are reviewable both in the D.C. Circuit and in the regional court of appeals where the aggrieved party resides or has its principal place of business.[5] Thus, an aggrieved party may elect to challenge any final FCC order construing Section 253 in either the D.C. Circuit (as in *City of Abilene*) or in the regional court of appeals (as in this case).

In cases arising from the Eighth Circuit, the FCC is thus placed in an impossible position. If the Commission rules in accordance with the Eighth Circuit's holding in this case that the state law is preempted, the aggrieved party (*e.g.*, the State) would have the right to file a petition for review of that ruling in the D.C. Circuit, where it would likely obtain reversal under *City of Abilene*. If on the other hand the Commission rules in accordance with the D.C. Circuit's *City of Abilene* holding, the aggrieved party (*e.g.*, the municipality) could file a petition for review in the Eighth

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[5] Under 47 U.S.C. 402(a), "[a]ny proceeding" for review of an FCC decision "shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." In turn, 28 U.S.C. 2343, which is a part of Chapter 158 of Title 28, provides that "[t]he venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

Circuit, where it would likely obtain reversal under the Eighth Circuit's decision in this case. That situation is exacerbated in Iowa and Nebraska. In light of the rulings of the state supreme courts in *Lincoln Electric System* and *Iowa Telephone Ass'n*, the validity of the state laws prohibiting municipalities in those States from providing telecommunications services will vary, depending on whether the issue arises in a petition to the FCC (in which case the choice of the reviewing court of appeals will determine the outcome) or in a case arising in the state courts.

The multi-dimensional conflict on the question presented in this case is therefore likely to breed enormous uncertainty. The question presented can be expected to continue to arise, as a number of other States have laws that limit the ability of political subdivisions to provide telecommunications services, and more States may pass such legislation in the future.[6] The Court should grant the petition for certiorari to achieve a single interpretation of an important federal statute, so that the FCC, States, municipalities, and private participants in the telecommunications industry may plan for the development of that industry with some degree

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[6] In addition to the Texas statute at issue in *City of Abilene*, the Missouri statute at issue in this case, and the Nebraska and Iowa statutes at issue in *Lincoln Electric System* and *Iowa Telephone Ass'n*, at least five other States have enacted laws that may be subject to challenge under Section 253(a). See, *e.g.*, Ark. Code Ann. § 23-17-409 (Mitchie Supp. 2001); Minn. Stat. Ann. § 237.19 (West 1992); Nev. Rev. Stat. Ann. § 268.086 (Mitchie Supp. 2001); Tenn. Code Ann. §§ 7-52-601 *et seq.*; Va. Code Ann. § 15.2-1500(B) (Michie Supp. 2001). See also *Municipal Elec. Auth.* v. *Georgia Pub. Serv. Comm'n*, 525 S.E.2d 399 (Ga. Ct. App. 1999) (discussing Georgia statutes), cert. denied, No. S00C0601 (Ga. May 1, 2000).

of certainty about the content of the controlling federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1379

THE MISSOURI MUNICIPAL LEAGUE; THE MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES; CITY UTILITIES OF SPRINGFIELD; CITY OF SIKESTON, MISSOURI; COLUMBIA WATER & LIGHT; AMERICAN PUBLIC POWER ASSOCIATION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS, SOUTHWESTERN BELL TELEPHONE COMPANY; STATE OF MISSOURI, INTERVENORS ON APPEAL
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; UNITED TELECOM COUNCIL, AMICI ON BEHALF OF PETITIONERS

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Rehearing and Rehearing En Banc
Denied Nov. 20, 2002*

OPINION

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* Judge McMillian and Judge Loken took no part in the decision in this matter.

Before WOLLMAN,[1] Chief Judge, BOWMAN, and STAHL,[2] Circuit Judges.

WOLLMAN, Chief Judge.

Various Missouri municipalities, municipal organizations, and public power companies (the Missouri Municipals) have petitioned for review of the Federal Communications Commission's (Commission) order denying the Missouri Municipals' petition to preempt a Missouri statute that prevents municipalities and municipally owned utilities from providing telecommunications services or telecommunications facilities. We vacate the order and remand to the Commission for further consideration.

I.

In February 1996, Congress enacted the Telecommunications Act of 1996 (the Act), which extensively amended the Communications Act of 1934, 47 U.S.C.A. §§ 151-615 (West 2001). The Act's intended purposes are to increase competition in the area of telecommunications services and to ensure the delivery of universal service. To help achieve these goals, § 101(a) of the Act, codified at 47 U.S.C. § 253, provides for "removals of barriers to entry," as follows:

> (a) In general
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> No State or local statute or regulation, or other State or local legal requirement, may prohibit or

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[1] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[2] The Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

. . .

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C.A. § 253 (West 2001 Supp.).

Section 392.410(7) of the Revised Statutes of Missouri prohibits the state's political subdivisions from obtaining the certificates of service authority necessary to provide telecommunications services or facilities directly or indirectly to the public. It provides:

No political subdivision of this state shall provide or offer for sale, either to the public or to a tele-

communications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities;

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services. The provisions of this subsection shall expire on August 28, 2002. Mo. Rev. Stat. § 392.410(7) (West 2001 Supp.).[3]

The Missouri Municipals filed a petition with the Commission, asking that it preempt Mo. Rev. Stat. § 392.410(7) as being in violation of § 253(a) of the Act. The Commission employs a two-step process in examining statutes under § 253. First, it determines whether the statute violates § 253(a). If it does, then the Commission considers whether the statute falls within the reservation clause of § 253(b). If it does not, then the

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[3] Missouri House Bill 1402, 2002 Mo. Legis. Serv. H.B. 1402 (Vernon's), signed into law on July 11, 2002, extended the expiration date to August 28, 2007, as well as making certain other changes in the wording of § 392.410(7), none of which affect our analysis in this case.

Commission must preempt the statute. Finding that the Missouri statute does not violate § 253(a), the Commission denied the petition, thus eliminating the need for § 253(b) review. *In the matter of the Missouri Municipal League*, 16 F.C.C.R. 1157 (2001). The Commission expressed its disagreement with the policy of the Missouri statute because it had found previously that "municipally-owned utilities . . . have the potential to become major competitors in the telecommunications industry . . . [and] can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small rural communities." *Id.* at 1162; *see also id.* at 1173 (Separate Statement of Commissioner Susan Ness). Even though it expressed its desire that states not adopt the type of complete barriers to entry found in § 392.410(7), the Commission felt bound by legal authorities not to preempt the statute, particularly a decision of the United States Court of Appeals for the District of Columbia, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). *Missouri Municipal League*, 16 F.C.C.R. at 1164-65; *see also id.* at 1172 (Separate Statement of Chairman William E. Kennard and Commissioner Gloria Tristani); and *id.* at 1173 (Separate Statement of Commissioner Susan Ness). The Missouri Municipals then filed a petition for a review of the Commission's order. Southwestern Bell Telephone Co. and the State of Missouri intervened in support of the Commission's decision.

We have jurisdiction to review final orders of the Commission under 47 U.S.C.A. § 402(a) (West 2001) and 28 U.S.C.A. § 2342(1) (West 1994).

II.

We review agency determinations under the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed .2d 694 (1984). First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we must defer to a reasonable interpretation of the statutory provision made by the agency. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000), *aff'd*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002).

A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). In *Gregory*, the Court "confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers . . . [and] concluded that, absent a clear indication of Congress's intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." *Salinas v. United States*, 522 U.S. 52, 59, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997). As the Court pointed out in *Salinas*, however, a "statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act'" that Congress intended to alter the federal-state balance in the relevant area. *Id.*

at 60, 118 S. Ct. 469 (quoting *Gregory*, 501 U.S. at 467, 111 S. Ct. 2395). Thus, the *Gregory* plain-statement rule does not require courts to limit a statute's scope where Congress's intent is plain, and, in fact, "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *Salinas*, 522 U.S. at 60, 118 S. Ct. 469 (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)).

In summary, the *Gregory* rule requires us to determine whether the statutory language plainly requires preemption. *Gregory* does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. We do not assume that Congress exercises its Supremacy Clause power lightly, however, and we must be "certain of Congress' intent" before we find that federal law overrides the balance between state and federal powers. *Gregory*, 501 U.S. at 460, 111 S. Ct. 2395. Even so, no matter how great the state interest, we should not strain to create ambiguity in a statute where none exists. *See Salinas*, 522 U.S. at 59-60, 118 S. Ct. 469. Accordingly, we ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law.

The dispute hinges on the meaning of the phrase "any entity" in § 253 of the Act. More precisely, do the words "any entity" plainly include municipalities and so satisfy the *Gregory* plain-statement rule? We hold that they do. Accordingly, because § 253 satisfies the *Gregory* plain-statement rule, it also satisfies *Chevron*'s

clear-statement rule and thus the Commission's contrary interpretation cannot stand.

We begin with the language Congress used, and, because the statute does not define the term "entity," we presume that "the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S. Ct. 788, 130 L. Ed. 2d 682 (1995). There is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term. An entity is "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." Black's Law Dictionary 553 (7th ed. 1999). Although municipalities in Missouri derive all of their powers from the state, and although a state can control its subdivisions in an almost limitless way, *see, e.g., Sailors v. Bd. of Educ.*, 387 U.S. 105, 107-08, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967), municipalities and other political subdivisions have an existence separate from that of the state. It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Furthermore, Congress's use of "any" to modify "entity" signifies its intention to include within the stat-

ute all things that could be considered as entities. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) (citations omitted). Time and time again the Court has held that the modifier "any" prohibits a narrowing construction of a statute. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, ——, 122 S. Ct. 1230, 1233, 152 L. Ed. 2d 258 (2002) (in statute requiring lease term providing for lease termination if public housing tenant or specified others engage in "any drug-related criminal activity," Congress's "use of the term 'any' to modify 'drug-related criminal activity' precludes" limiting the statute to cover only "drug-related activity that the tenant knew, or should have known, about"); *Brogan v. United States*, 522 U.S. 398, 400-01, 405, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998) ("any false, fictitious or fraudulent statement" includes false statements of whatever kind); *Gonzales*, 520 U.S. at 5, 117 S. Ct. 1032 ("any other term of imprisonment" means all prison sentences, both state and federal, where Congress did not add any language limiting the breadth of the term "any"); *Freytag v. Comm'r*, 501 U.S. 868, 873-74, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) ("any other proceeding" allows Chief Judge to assign all types of cases to a special trial judge); *United States v. James*, 478 U.S. 597, 605, 106 S. Ct. 3116, 92 L. Ed. 2d 483 (1986) ("any damage" and "liability of any kind" include all possible damages from a government project, not limited to just property damage); *United States v. Turkette*, 452 U.S. 576, 580-81, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89, 100 S. Ct. 1889, 64 L. Ed. 2d 525 (1980) ("any other

final action" includes all actions that constitute the agency's last word); and *Bhd. of RR Trainmen v. Balt. & O.R. Co.*, 331 U.S. 519, 529, 67 S. Ct. 1387, 91 L.Ed. 1646 (1947) ("any proceeding arising under this Act" allows intervention in all cases under the statute); *accord Southern Co. v. FCC*, 293 F.3d 1338, 1349 (11th Cir. 2002) (plain meaning of "any" is "all" unless specifically limited in statute).

In *Salinas v. United States*, the Court was called upon to decide whether the federal bribery statute, which applies to "any business transaction," applies only to bribes affecting federal funds. The defendant, who had bribed a state official, argued that because the bribery statute upset the federal-state balance, the *Gregory* plain-statement rule required a plain statement of congressional intent that the bribery statute apply to bribes having no effect on federal funds. In holding that the bribery statute included bribes of state officials, even where no federal funds were affected, the Court stated that "the word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." *Salinas*, 522 U.S. at 57, 118 S. Ct. 469. The Court also stated that "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id.* at 60, 118 S. Ct. 469.

In *City of Abilene v. FCC*, the Court of Appeals for the District of Columbia reviewed a Commission order that refused to preempt a Texas statute similar to Mo. Rev. Stat. § 392.410(7), holding that § 253 did not contain a plain statement sufficient to preempt a traditional area of state sovereignty. With all due deference to our sister circuit's holding, and mindful of our desire to maintain uniformity among the circuits, *United*

States v. Auginash, 266 F.3d 781, 784 (8th Cir. 2001), we do not find *City of Abilene* to be persuasive. The D.C. Circuit noted that the mere possibility that the term "entity" could include municipalities does not satisfy *Gregory*. *City of Abilene*, 164 F.3d at 52-53. The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. *Id.* at 52. Counsel for the Commission stated at oral argument that the D.C. Circuit did not consider *Salinas* because of that court's rules regarding cases not cited in the original briefs. Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no reference in any of the Supreme Court's decisions regarding the word "any" about Congress's "tone of voice" and "emphasis." We note that a district court in Virginia, after considering both the "any" cases and *City of Abilene*, concluded that "any entity" should be read broadly and held that a Virginia statute similar to Mo. Rev. Stat. § 392.410(7) must be preempted. *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 747-49 (W.D. Va. 2001) ("it strains logic to interpret the term 'any entity' in § 253(a) to mean 'any entity except for municipalities and other political subdivisions of states' ").

Accordingly, we conclude that because municipalities fall within the ordinary definition of the term "entity," and because Congress gave that term expansive scope

by using the modifier "any," individual municipalities are encompassed within the term "any entity" as used in § 253(a). This language would plainly include municipalities in any other context, and we should not hold otherwise here merely because § 253 affects a state's authority to regulate its municipalities. Congress need not provide specific definitions for each term in a statute where those terms have a plain, ordinary meaning and Congress uses an expansive modifier to demonstrate the breadth of the statute's application. *See Gregory*, 501 U.S. at 467, 111 S. Ct. 2395 (statute need not explicitly mention judges to have judges included in the definition); *Salinas*, 522 U.S. at 60, 118 S. Ct. 469 (statute need not address every interpretive theory offered in order to be unambiguous).

We recognize Missouri's important interest in regulating its political subdivisions. The *Gregory* standard is designed to respect such interests. That *Salinas* was a criminal case in which the state had no interest in allowing its officials to take bribes does not detract from its fundamental holding regarding the authority of Congress to change the balance of state and federal powers when it employs plain language to do so. *Salinas* held that by using the clearly expansive term "any," Congress expressed its intent to alter this relationship. We conclude that the same must be said about the preemption provision set forth in § 253.

Missouri also argues that because the state controls its municipalities' authority, § 253 does not apply to this case. Section 253 directs the Commission to preempt laws that prohibit "the ability of any entity" to provide telecommunications services. Missouri argues that because § 392.410(7) addresses its municipalities' authority to provide telecommunications services rather than

their ability to do so, § 253 does not apply. Missouri contends that if § 392.410(7) is held to be preempted, it would not be able to prevent its attorney general's office from providing telecommunications services. Putting aside the highly fanciful nature of this argument, it needs only to be noted that unlike municipalities, the Missouri Attorney General's office has no independent authority to provide telecommunications services. Section 392.410(7) is a prohibition on the ability to exercise the authority that municipalities otherwise possess, precisely the type of prohibition that § 253 is designed to prevent. *See City of Bristol*, 145 F. Supp. 2d at 748 (Virginia municipalities otherwise have authority to provide telecommunications services and state statute designed to prohibit them from exercising that authority preempted by § 253).

The Commission's order is vacated, and the case is remanded to the Commission for further proceedings consistent with the views set forth in this opinion.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)
Washington, D.C. 20554

CC Docket No. 98-122
FCC 00-443

IN THE MATTER OF THE MISSOURI MUNICIPAL LEAGUE; THE MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES; CITY UTILITIES OF SPRINGFIELD; CITY OF COLUMBIA WATER & LIGHT; CITY OF SIKESTON BOARD OF UTILITIES.

Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri

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Adopted: Dec. 19, 2000
Released: Jan. 12, 2001

MEMORANDUM OPINION AND ORDER

By the Commission: Chairman KENNARD and Commissioner TRISTANI issuing a joint statement; Commissioner NESS issuing a separate statement.

I. INTRODUCTION

1. On July 8, 1998, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and

the Sikeston Board of Utilities (collectively, the Missouri Municipals), on behalf of themselves and more than 600 municipalities and 63 municipal electric utilities located in Missouri, filed the above-captioned petition (Petition) asking the Commission to preempt Section 392.410(7) of the Revised Statutes of Missouri (HB 620), and declare it unlawful and unenforceable.[1] Several parties filed comments and reply comments addressing the petition.[2] The Missouri Municipals assert that HB 620 violates section 253(a) of the Communications Act of 1934, as amended,[3] and falls outside the scope of authority reserved to the states by section 253(b) of the Act,[4] and thus satisfies the requirements for preemption by the Commission pursuant to section 253(d) of the Act.[5]

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[1] Petition at 35.

[2] The Commission placed the Missouri Municipals' Petition on public notice on July 14, 1998. *Pleading Cycle Established for Comments on Missouri Petition for Preemption of Section 392-410(7) of the Revised Statutes of Missouri*, Public Notice, CC Docket No. 98-122, DA 98-1399 (rel. July 14, 1998). We received comments from the following parties: The American Public Power Association (APPA), the City of O'Fallon, the City of St. Louis, GTE, MCI Telecommunications Corporation (MCI), the Missouri Attorney General, National Telephone Cooperative Association (NTCA), Southwestern Bell Telephone Company (Southwestern Bell), and UTC, The Telecommunications Association (UTC). The Missouri Municipals, APPA, Missouri River Energy Services (Missouri River), Southwestern Bell and UTC filed replies.

[3] 47 U.S.C. § 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 et seq.

[4] 47 U.S.C. § 253(b).

[5] Petition at 23-35 (citing 47 U.S.C. § 253(d)).

2. For the reasons described below, we do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state, from providing telecommunications services or facilities. The Commission has found previously that political subdivisions of a state, such as a municipality, are not "entities" under section 253(a) of the Act.[6] We find that, under Missouri law, municipally-owned utilities are generally part of the municipality, itself, and are therefore not separate and apart from the state of Missouri, and are not entities subject to section 253(a). We do find, however, that if a municipally-owned utility has an independent corporate identity that is separate from the state, it can be considered an entity for which section 253 preemption is available.

II. BACKGROUND

3. The Missouri Municipals seek preemption of HB 620 pursuant to section 253 of the Communications Act, which Congress enacted to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition.[7] In assessing whether to preempt enforcement of HB 620 pursuant to section 253, we first determine whether the statute is proscribed by section 253(a), which states that no state or local requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide any

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[6] *Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3546, para. 184 (1997) (*Texas Preemption Order*).

[7] *Texas Preemption Order*, 13 FCC Rcd at 3480, para. 41.

interstate or intrastate telecommunications service."[8] If we find that HB 620 is proscribed by section 253(a) standing alone, we must then determine whether it falls within the reservation of state authority set forth in section 253(b), which excludes from the scope of the Commission's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in section 253(b).[9] If a law, regulation or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement "to the extent necessary to correct the violation" in accordance with section 253(d).[10] This is the approach that the Commission has taken in prior orders addressing section 253.[11]

4. On August 28, 1997, the General Assembly of Missouri enacted HB 620, which replaced certain provisions of Missouri's telecommunications statute regarding the issuance of certificates of public convenience and necessity for the provision of telecommunications service. With certain limited exceptions, it prohibits

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[8] 47 U.S.C. § 253(a).

[9] 47 U.S.C. § 253(b).

[10] 47 U.S.C. § 253(d).

[11] *Texas Preemption Order*, 13 FCC Rcd at 3480, paras. 41-42; *Silver Star Telephone Company*, Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCBPol 97-1, 13 FCC Rcd 16356, 16360-61, paras. 8-11 (1998) (*Silver Star Preemption Order*); AVR, L.P. *d/b/a Hyperion of Tennessee, L.P. Petition for Preemption*, CC Docket No. 98-92, Memorandum Opinion and Order, 14 FCC Rcd 11064, 11067-68, paras. 7-9 (1999) (*Hyperion Order*), *recon. pending.*

political subdivisions from obtaining a certificate of service authority to provide telecommunications services or facilities. The statute states:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
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> (1) For its own use;
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> (2) For 911, E-911 or other emergency services;
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> (3) For medical or educational purposes;
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> (4) To students by an educational institution;
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> (5) or Internet-type services.
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> The provisions of this subsection shall expire on August 28, 2002.[12]

5. HB 620 is similar to a Texas statute that the Commission declined to preempt.[13] In the *Texas Preemp-*

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[12] Mo. Rev. Stat. § 392.410(7) (1998). Under section 392.410(2) of the Missouri Public Service Commission law, a certificate of service authority is required to provide intrastate interexchange telecommunications service and local exchange telecommunications service. Mo. Rev. Stat. § 392.410(2) (1998).

tion Order, the Commission found that a provision of the Texas Public Utility Regulatory Act of 1995 ("PURA95")[14] that prohibited municipalities from providing telecommunications services did not violate section 253(a). Ruling on a petition for preemption of section 3.251(d) of PURA95 filed by the City of Abilene, Texas, the Commission stated that the City of Abilene was not an "entity" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. It found that preempting the enforcement of the Texas statute would insert the Commission "into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253."[15] The Commission reasoned that Texas retains substantial sovereign power to decide what activities to authorize its political subdivisions to undertake. With regard to such fundamental state decisions, the Commission stated that it must adhere to the standard in *Gregory v. Ashcroft*, in which the Supreme Court held that a court must not construe a federal statute to preempt traditional state powers unless Congress has made its intention to do so unmistakably clear in the language of the statute.[16]

6. In the *Texas Preemption Order*, the Commission determined that because section 253(a) is directed at requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, it appears to prohibit restrictions

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[13] *Texas Preemption Order*, 13 FCC Rcd at 3544, para. 179.

[14] Tex. Rev. Civ. Stat. Ann. Art. 1446c-0 (West Supp. 1996) (hereinafter PURA95).

[15] *Texas Preemption Order*, 13 FCC Rcd at 3544, para. 179.

[16] *Id.* at 3545, para. 181, *citing Gregory v. Ashcroft*, 501 U.S. 452 (1991).

on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself.[17] The Commission found that if it construed the term "entity" in section 253(a) in this context to include municipalities, it would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects.[18] The Commission did not find a clear indication of Congressional intent in section 253 to intervene in this state-local relationship as it affected municipalities, but expressly declined to address the issue of whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.[19]

7. The City of Abilene sought judicial review of the *Texas Preemption Order* before the Federal Court of Appeals for the D.C. Circuit. The D.C. Circuit upheld the Commission's interpretation of Section 253.[20] Citing Gregory, the court held that the text of section 253 is not sufficiently clear to find that Congress intended in 253(a) to transfer to this Commission the states' power

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[17] *Id.* at 3546-47, para. 184.

[18] *Id.* at 3546-47, para. 184.

[19] *Id.* at 3544, para. 179. In the *Texas Preemption* proceeding, ICG Access Services filed and later withdrew a petition for declaratory ruling that addressed the ability of municipally-owned utilities to provide telecommunications services. The City of Abilene apparently did not operate an electric utility at the time of the filing of its petition, and did not address the ability of municipal utilities to provide service in Texas. *See also* UTC Reply Comments at 2.

[20] *City of Abilene, Texas, et al. v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

to regulate the activities of their municipalities.[21] It found, in particular, that because Congress left "entity" undefined in the Communications Act, and because the City of Abilene did not offer other textual evidence to support preemption, the City could not establish that Congress clearly intended for municipalities to be considered "entities."[22] Consistent with the scope of the *Texas Preemption Order*, the court stated that the issue of whether utilities owned by municipalities are "entities" within the meaning of Section 253(a) was not before it.[23]

8. The Missouri Municipals argue that HB 620 squarely presents the issue of whether a state law that prohibits municipally-owned utilities from providing telecommunications service violates section 253 of the Act.[24] They maintain that this case differs from the *Texas Preemption Order* and *Abilene* because, in those two cases, the Commission and the court declined to rule on whether the term "any entity" in section 253 applies to utilities owned by municipalities. They state that even if the court and the Commission were correct

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[21] *Id.* at 51-52, *citing Gregory*, 501 U.S. at 461.

[22] *Id.* at 52.

[23] The Court stated, "In a brief, one-paragraph appeal to 'legislative history' consisting of a committee report and two post-enactment letters from Members of Congress, Abilene fails to acknowledge that the statements it quotes deal with an issue not before us —whether public utilities are entities within § 253(a)'s meaning." 164 F.3d at 53, n.7.

[24] Letter from James Baller, The Baller Herbst Law Group, on behalf of the Missouri Municipals, to the Honorable William E. Kennard, the Honorable Susan Ness, the Honorable Harold Furchtgott-Roth, the Honorable Michael Powell, the Honorable Gloria Tristani, Cc Docket No. 98-122 (filed Jan. 26, 1999) at 2-4 (*Missouri Municipals Jan. 26, 1999 Letter*).

in concluding that Congress did not clearly intend to include municipalities that do not own and operate electric utilities within the scope of section 253(a), Congress did clearly intend the term "any entity" to apply to power companies owned by municipalities.[25] They argue that "any entity" should be interpreted broadly to include such municipally-owned utilities,[26] and assert that the legislative history of section 253 confirms that these entities are included within the scope of section 253(a).[27]

III. DISCUSSION

9. We do not preempt the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state of Missouri, from providing telecommunications services or facilities. As we found in the *Texas Preemption Order*, the term "any entity" in section 253(a) of the Act was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation.[28] Because we find that HB 620 is not proscribed by section 253(a), we need not determine whether it falls within the reservation of state authority set forth in section 253(b). We do find however that if a municipally-owned

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[25] Letter from James Baller, The Baller Herbst Law Group, on behalf of the Missouri Municipals, to Magalie Roman Salas, Secretary, FCC, Cc Docket No. 98-122 (filed June 1, 1999) (*Missouri Municipals June 1, 1999 Letter*) at 2. *See also* MCI Comments at 2-4; UTC Comments at 9-14; Missouri River Reply at 4-5.

[26] Petition at 17-19, *Missouri Municipals Jan. 26, 1999 Letter* at 4-6. See also MCI Comments at 3-4.

[27] Petition at 6-15, 32-34.

[28] *Texas Preemption Order*, 13 FCC Rcd at 3546-47, para. 184.

utility has an independent corporate identity that is separate from the state and seeks to provide telecommunications services and facilities in this context, then it can be considered an entity for which section 253 preemption is available.

10. While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service.[29] The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry.[30] In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services.[31] In that report, we presented a case study detailing advanced services

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[29] *Id.* at 3549, para. 190.

[30] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CC Docket No. 98-102, Fifth Annual Report, FCC 98-335 (rel. Dec. 23, 1998).

[31] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) (*Section 706 Second Report*). Advanced services refer to "high-speed" services that offer a transmission speed of 200 kilobits per second in at least one direction, thereby allowing a customer, for example, to change Internet web pages "as fast as one can flip through the pages of a book." *Id.* at paras. 10-11.

deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers.[32] We noted that the degree of advanced services deployment in Muscatine, which has three facilities-based, high-speed service providers for residential customers, including the municipal utility, is due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services.[33] Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.[34] We are also

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[32] *Id.* at paras. 139-51.

[33] *Id.* at para. 140.

[34] APPA Comments at 3. See also Letter from James Baller, The Baller Herbst Law Group, on behalf of Missouri Municipals, to Jodie Donovan-May. Policy Division, Common Carrier Bureau, CC Docket No. 98-122 (filed Sept. 14, 1999) (*Missouri Municipals Sept. 14, 1999 Letter*) at Attachment F (describing the broadband services various municipally-owned utilities provide in small communities in Georgia); Letter from James Baller, The Baller Herbst Law Group, on behalf of Missouri Municipals, to Magalie Roman Salas, FCC Secretary, CC Docket No. 98-122 (filed Apr. 26, 1999) at 1 (stating that municipal power utilities are already using their facilities to provide a range of communications services in 33 states that have not enacted regulations prohibiting them from doing so); MCI Comments at 4 (stating that MCI is partnering with municipal electric utilities, rural electric cooperatives and other local government entities in a number of Midwestern states to provide telecommunications services to business and residential customers). Municipally-owned utilities also serve large cities,

encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives.[35]

11. We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor.[36] While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers,[37] we believe these issues can be dealt

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including Los Angeles, Seattle, Cleveland and San Antonio, and are also potential competitors in these areas. 34 APPA Comments at 1-2. *See also* Missouri River Energy Services Reply at 3.

[35] Missouri River Comments at 3. Missouri Municipals Sept. 14, 1999 Letter at Attachment A (listing municipally-owned cable systems located primarily in rural or small markets in 24 states).

[36] *Texas Preemption Order*, 13 FCC Rcd at 3549, para. 190.

[37] NTCA Comments at 6; Southwestern Bell Comments at 2-4; GTE Comments at 8-12. Several other commenters from Missouri expressed concern that municipally-owned utilities could impede competition by serving dual roles as regulator and competitor. *See* Letter from Rep. Chuck Graham, Missouri State Representative, 24th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 26, 2000); Letter from Rep. Sam D. Leake, Missouri State Representative, 9th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000); Letter from Rep. Carol Jean Mays, Missouri State Representative, 50th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000);

with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.[38]

A. Application of HB 620 to Municipalities

12. HB 620 prohibits political subdivisions from becoming certified to provide telecommunications services or facilities. According to the Missouri Municipals, HB 620 therefore prohibits municipalities from providing such services themselves or from making their facilities available to others for use in competing with the incumbent providers.[39] We are thus presented in this proceeding with the same issue that the Commission addressed in the *Texas Preemption Order*—whether section 253 bars a state from deciding that it will not permit its subdivisions to compete in the provision of certain telecommunications services. This

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Letter from Rep. Larry Crawford, Missouri State Representative, 117th District, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Jan. 27, 2000); Letter from David A. Leezer, Economic Development Center of St. Charles County, Missouri, to Chairman Kennard, FCC, CC Docket No. 98-122 (filed Feb. 7, 2000).

[38] *Texas Preemption Order*, 13 FCC Rcd at 3549, para. 190. We also note that municipalities are required under section 253(c) of the Act to administer compensation requirements for public rights of-way in a competitively neutral and non-discriminatory manner. 47 U.S.C. § 253(c). They are also subject to petitions for preemption filed under section 253 if they unlawfully favor a municipally-owned utility over other competitors.

[39] Petition at 20-21.

is a fundamental issue concerning the relationship between a state and its political subdivisions.[40]

13. Consistent with the *Texas Preemption Order* and the court's holding in Abilene, we conclude that because municipalities, as political subdivisions of the state, are not "entities" within the meaning of section 253(a), HB 620 does not violate 253(a) to the extent that it prohibits them from becoming certified to provide telecommunications service or facilities. The Missouri Constitution authorizes cities with more that 5,000 inhabitants to adopt city charters allowing them to operate independently of the state, except that they may not undertake any activities which are inconsistent with the state constitution or limited by statute.[41] HB 620 is a statute the Missouri legislature has adopted to limit the powers of its political subdivisions, including its municipalities. HB 620 is therefore like section 3.251(d) of PURA95 in Texas in that it prohibits Missouri's municipalities, as political subdivisions of the state, from providing telecommunications service. As we found in the *Texas Preemption Order*, preempting the enforcement of HB 620 as it applies to municipalities would insert the Commission into the relationship between the state of Missouri and its political subdivisions in a manner that was not intended by section 253.[42]

14. We are not persuaded by the Missouri Municipals' arguments that we are not bound by the findings in the *Texas Preemption Order* or the *Abilene* decision

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[40] *Texas Preemption Order*, 13 FCC Rcd at 3546, para. 183.

[41] Missouri Constitution, Article 6, § 19(a) (1998).

[42] *Texas Preemption Order*, 13 FCC Rcd at 3544, para. 179.

regarding the scope of section 253(a).[43] The court found in *Abilene* that although the text of section 253(a) refers broadly to "any entity," such language is not clear enough to demonstrate, pursuant to Gregory, that Congress intended to intrude upon state-local government relationships.[44] The Missouri Municipals, who filed their petition for preemption before the D.C. Circuit issued the January 1999 *Abilene* decision, argue in a supplemental filing that the Commission should not adhere to that decision, but should interpret the term "any" in section 253(a) in the same manner in which it interpreted that term in an unrelated proceeding issued after the *Texas Preemption Order*. Specifically, they point out that the Commission determined in the *Pole Attachment Order*[45] that Congress' use of the term, "any telecommunications carrier" in section 224 of the Act, which regulates utility pole attachments, is an express indication that Congress intended both wireless and wireline carriers to be able to attach equipment to public utility poles.[46] They argue, by analogy, that the Commission should similarly recognize that "any entity" in section 253(a) is a plain language indication that Congress intended to include all entities, both publicly-owned and privately-owned, within the scope

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[43] Petition at 4-6.

[44] *Abilene*, 164 F.3d at 52 (citing *Gregory*, 501 U.S. at 460).

[45] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) (*Pole Attachment Order*), *aff'd in part and rev'd in part sub nom., Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rehearing denied*, 226 F.3d 1220, petition for cert. filed (U.S. Nov. 21, 2000) (No. 00-843).

[46] *Missouri Municipals Jan. 26, 1999 Letter* at 5 (emphasis in original).

of section 253(a).[47] The Eleventh Circuit held recently in *Gulf Power Company v. FCC* that despite Congress' use of the term "any" in section 224, the Commission does not have authority to regulate pole attachments for wireless communications because utility poles are not bottleneck facilities for wireless carriers.[48] For purposes of this case, *Gulf Power Company* demonstrates that the term "any" cannot be interpreted in its broadest sense if the statute in question is not intended to apply to every type of entity. Accordingly, we cannot interpret the term "any" in section 253(a) to include municipalities because, as explained in the *Texas Preemption Order* and *Abilene*, the statute does not apply to these entities. Indeed, the court stated in *Abilene* that the Act provides no evidence that Congress' intended that the term "any entity" would include

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[47] *Id.* at 6; Petition at 15-16; 18-20. The Missouri Municipals also argue that the Commission includes municipalities and municipal electric utilities as "entities" that must make universal contributions under the Act. Petition at 17-18. The Commission's decision to require universal service contributions from municipal telecommunications providers was based on the statutory requirement that telecommunications providers that provide telecommuniations service "for a fee" must contribute. The Commission found that "for a fee" does not necessarily mean "for profit," and therefore rejected arguments by UTC that municipal providers are not required to contribute. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9171-72, 9177, paras. 775, 784. Unlike the current proceeding, the Commission was not addressing whether or not to preempt a state's authority to determine if its political subdivisions should be permitted to provide telecommunications service in the first place.

[48] *Gulf Power Company v. FCC*, 208 F.3d 1263, 1273-74 (11th Cir. 2000).

every conceivable thing within the category of "entity."[49]

15. We also disagree with APPA that the *Cowlitz River Dam* cases support preemption of HB 620. APPA argues that those cases establish that when a state grants its political subdivisions authority to engage in activities that are subject to federal law,

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[49] *Abilene*, 164 F.3d at 52. We also reject the Missouri Municipals' argument that we must interpret the term "any" in the broadest sense based on the U.S. Supreme Court's holding in *Salinas v. U.S.* Petition at 30 (citing *Salinas v. U.S.*, 118 S. Ct. 469 (1997)). In that case, the Court determined that a federal bribery statute that forbid acceptance of a bribe by a covered official in connection with "any" official business or transaction must be interpreted broadly to include transactions that did not affect federal funds. *Salinas*, 118 S. Ct. at 473. It also found that the text of the overall statute, not just the phase containing the term, "any," was broad enough to clearly encompass all types of bribes. *Id.* at 473-74. The Court went on to state that *Gregory v. Ashcroft* did not apply to the case before it because the statute was not "susceptible of two plausible interpretations, one of which would alter the existing balance of federal and state powers." *Id.* at 474-75. Unlike in *Salinas*, section 253(a) is susceptible of more than one interpretation, as the D.C. Circuit already determined in *Abilene*. Moreover, to preempt the statute would alter the existing balance of power between Missouri and its municipalities in a way that the Commission has said was not intended by section 253(a). *Texas Preemption Order*, 13 FCC Rcd at 3544, para. 179. We also disagree with the Missouri Municipals' argument that another case, *Alarm Industry Communications Council v. FCC*, requires us to interpret the term "entity" broadly so as to further Congress' intent to include municipalities and municipal utilities within the scope of section 253(a). Petition at 28-29 (citing 131 F.3d 1066 (D.C. Cir. 1997)). As we have stated in this order, we are unable to discern Congress' intent clearly enough so as to meet the *Gregory* standard, and therefore must find that "entity" does not include political subdivisions of the state, including municipalities and municipally-owned utilities.

state laws that would be preempted if applied to privately-owned providers of service are also preempted as applied to the same activity by publicly-owned providers.[50] In the primary case, the Ninth Circuit found that a potential municipal licensee that was authorized by the Federal Power Commission to construct and operate hydroelectric dams could not be subjected to state licensing regulations, but need only show compliance with federal regulations governing dam construction in order to obtain a license.[51] The court therefore found that the Federal Power Commission acted within its authority in not requiring the City to comply with the relevant state laws.[52] Unlike the case before us here, the state did not argue that the City of Tacoma lacked legal authority to engage in hydroelectric activities in the first instance. In fact, the court stated expressly that "[w]e do not touch on the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the [Federal Power] Commission as relevant to the practicability of

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[50] Letter from Richard B. Geltman, General Counsel, APPA, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-122 (filed Sept. 29, 2000), Att. at 3-4 (*citing State of Washington Dep't. of Game v. Federal Power Commission*, 207 F.2d 391 (9th Cir. 1953) (*en banc*), *cert. denied*, 347 U.S. 936 (1954); *City of Tacoma v. Taxpayers of Tacoma*, 43 Was. 2d 468, 262 P.2d 214 (1953); City of *Tacoma v. Taxpayers of Tacoma*, 49 Wash. 2d 781, 307 P.2d 567 (1957) (en banc), *rev'd and remanded*, 357 U.S. 320 (1958) (*Cowlitz River Dam cases*); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946)).

[51] *State of Washington Dep't. of Game*, 207 F.2d at 396.

[52] *Id.* at 396

the plan, but the Commission has no power to adjudicate them."[53] The court thus recognized, similar to our finding here, that questions involving the "legal capacity" of the municipality to undertake hydroelectric activities must be left to the state.[54]

B. Application of HB 620 to Municipally-Owned Utilities

16. We conclude that we cannot adopt the Missouri Municipals' argument that, notwithstanding the *Texas Preemption Order* and *Abilene*, section 253(a) clearly applies to municipally-owned utilities that seek to provide competitive telecommunications service.[55] Although the Commission expressly declined in the *Texas Preemption Order* to decide whether section 253 barred the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility, we adhere to the analysis in that case and in *Abilene* regarding state sovereignty when we address this issue.

17. As we stated above, the Commission clearly found in the *Texas Preemption Order* that section 253(a) does not apply to the political subdivisions of a state.[56] The Missouri Municipals have not presented any evidence that municipally-owned utilities are not

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[53] *Id.* at 396-97.

[54] *Id.* at 396.

[55] Petition at 28-32. The Missouri Municipals refer to the application of HB 620 to municipal electric utilities. Other commenters refer to its applications to municipally-owned utilities. *See, e.g.*, Southwestern Bell Comments at 11. We do not distinguish between municipally-owned utilities and municipal electric utilities in this Order to the extent that both operate as political subdivisions of the state.

[56] *Texas Preemption Order*, 13 FCC Rcd at 3544-48, paras. 179-86.

considered to be political subdivisions in Missouri. Although "political subdivision" is not defined in Missouri's public service commission law, of which HB 620 is part,[57] the Supreme Court of Missouri has found a municipality and its municipally-owned utility to be political subdivisions under the Missouri Constitution's taxation provisions.[58] Indeed, it appears to be the case in Missouri that a municipally-owned utility is part of the city, itself. For example, the Missouri Municipals describe the City of Springfield in which the city council appoints a board to manage the city utility.[59] Although the board has authority to manage the day-to-day operations of the utility, it is clear from the board's charter that the utility is effectively a department of the city and is not an entity with a separate juridical personality. The city council must approve the utility's budget as well as the rates it charges, and like "other departments or agencies of the city," the utility must purchase supplies and equipment "in such a manner as to take advantage of the combined purchasing power of

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[57] The Missouri Public Service Commission law defines "municipality" to include a city, village or town. Mo. Rev. Stat. § 386.020(33) (1998).

[58] *See City of Springfield Missouri v. Fredricks*, 630 S.W.2d 574, 575 (Mo. 1982).

[59] Petition at 20-21, Attachment Q, Springfield City Charter, Art. XVI. The State of Missouri has empowered its cities and other municipalities to erect, maintain and operate public utilities. Mo. Rev. Stat. § 91.010 (1998). Southwestern Bell states that the utilities generally operate under the direction of a board of public utilities, which is accountable to the city council. Southwestern Bell Comments at 11 (citing *State ex rel. City of Springfield v. Public Serv. Comm'n.*, 812 S.W.2d 827 (Mo. Ct. App. 1991)).

the city as a whole."[60] Southwestern Bell also points out that under Missouri law, municipal public utility boards are not separate entities from the municipality, but operate as part of the city government, like the mayor, zoning commissions or boards of adjustment.[61]

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[60] Petition at 20-21, Attachment Q, Springfield City Charter, Art. XVI, §§ 16.8, 16.12, 16.13. We also note that the Missouri Public Service Commission granted a certificate of service authority to "the City of Springfield, Missouri, through its Board of Public Utilities," to provide the limited intrastate telecommunications services that it is authorized to provide under HB 620. *Application of the City of Springfield, Missouri, through the Board of Public Utilities for a Certificate of Service Authority to Provide Nonswitched Local Exchange and Intrastate Interexchange Telecommunications Services to the Public Within the State of Missouri and for Competitive Classification*, Case No. TA-97-313, Report and Order, issued July 11, 1997. *See also Glidewell v. Hughey*, 314 S.W.2d 749, 755 (Mo. 1958) (The Supreme Court of Missouri determined that the Board of Public Utilities of Springfield "(I)nstead of being set up in the nature of a separate municipal corporation with power to sue and be sued . . . is only an administrative body or department of the City Government . . .", and that the compensation and working conditions of the public utility's employees involved the exercise of legislative power and could not become a matter of bargaining and contract.).

[61] Letter from B. Jeannie Fry, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-122 (filed Sept. 8, 1999) (Southwestern Bell Sept. 8, 1999 Letter), Attachment at 3 (citing *North Kansas City Hosp. Bd. of Trustees v. St. Lukes Northland Hosp.*, 984 S.W.2d 113, 117 and n.2 (Mo. Ct. App. 1998)). The Supreme Court of Missouri has also found that a municipal corporation that operates separate and apart from the city is still a political subdivision of the state because it derives its status as a public entity from an act of the General Assembly. *City of S. Louis v. Ryan*, 776 S.W.2d 13, 16 (Mo. 1989) (finding that the City of St. Louis does not control the manner in which the St. Louis Housing Authority, a political subdivision of the state, performs its statutorily mandated tasks).

Accordingly, we find that municipally-owned utilities that operate as political subdivisions of the state under Missouri law, rather than as entities with a separate juridical personality, are not entities subject to section 253(a).

18. We reject the Missouri Municipals' argument that even if municipally-owned utilities are political subdivisions of the state, the legislative history of section 253(a) demonstrates that Congress clearly intended the term, "any entity" to cover municipal electric utilities.[62] The Missouri Municipals cite scattered excerpts of legislative history to support their argument. They explain that the 103rd Congress heard testimony about the benefits of municipal utility entry, and then broadly defined "telecommunications service" in the precursor to the 1996 Act to include service provided by "all entities," which the Missouri Municipals infer to include municipally-owned utilities.[63] They also state that in a report addressing the provisions of the Act that would later become section 253(a), Congress indicated that states or local governments that own and operate municipal energy utilities may make their telecommunications facilities available to certain telecommunications carriers, but not others, without violating the principle of non-discrimination.[64] The Missouri Municipals also point out that the 104th Congress, which adopted the 1996 Act, noted that states

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[62] Missouri Municipals Jan. 26, 1999 Letter at 3.

[63] Petition at 7-9 (citing Testimony of William J, Ray on behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351, 353-54 (1994); S. Rep. No. 103-367, 103d Cong., 2d Sess. 54-56 (1994)).

[64] Petition at 10-11 (citing S. Rep. No. 103-367 at 56).

may not rely on section 253(b) of the Act to prohibit a "utility" from providing telecommunications service.[65] We are not persuaded that this legislative history is enough to overcome the court's holding in *Abilene* that the "language of the federal law" must indicate that Congress intended to reach into the state governmental

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[65] Petition at 11-13 (citing H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996)). The record also contains several letters from members of Congress stating that it was the intent of the Congress when it enacted section 253 to enable any entity, without qualification, to provide communications service, and that it expected the Commission to exercise its authority under section 253 to preempt state regulations that prohibited municipally-owned utilities from entering the telecommunications market. Petition, Attachment I, Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt, Aug. 5, 1996 (section 253 requires the Commission to "reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control"); Petition, Attachment M, Letter from Senator J. Robert Kerrey to FCC Chairman Reed Hundt, Sept. 9, 1997 (by using the term "any entity" in section 253, "Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets"). *See also* Missouri Municipals June 1, 1999 Letter, Attachment E, Letter from Congressmen Joe Moakley, Edward J. Markey, Barney Frank to FCC Chairman William E. Kennard, Apr. 20, 1999; Attachment F, Letter from Congressman Rick Boucher to FCC Chairman William E. Kennard, Mar. 16, 1999; Attachment G, Letter from Senators J. Robert Kerrey, Tom Harkin, Byron Dorgan, Paul Wellstone, John Kerrey, Mar. 26, 1999; Attachment H, Letter from Congressman Virgil H. Goode to FCC Chairman William E. Kennard, Feb. 12, 1999. These letters represent the personal views of various legislators made after the passage of section 253, and are thus not entitled to probative weight. *Bread Political Action Committee v. FEC*, 455 U.S. 577, 582, n.3, *quoting Quern v. Mandley*, 436 U.S. 725, 736, n. 10 (1978).

structure.[66] Even if we were to look outside the language of the statute to discern Congress' intent, the legislative history does not help clarify whether or not it intended section 253(a) to govern state-local relationships regarding the provision of telecommunications service. Other than indicating that municipal energy utilities may make their facilities available to carriers, the legislative history that the petitioners cite does not distinguish between publicly-owned and privately-owned utilities. Its limited reference to the ability of municipal energy utilities to lease spare capacity on their facilities does not indicate clearly or at all whether Congress intended to preempt states from prohibiting such a practice. We therefore cannot rely on the legislative history to find that Congress intended to include municipally-owned utilities within the scope of section 253(a). We are aware, as the Missouri Municipals point out, that the Supreme Court stated in *Gregory* that Congress need not list explicitly each entity that would be covered by a federal statute.[67] The Court did state, however, that "it must be plain" to anyone reading the Act that it covers the entity in question.[68] It is not plain from either the language of the statute or the legislative history that Congress intended to include municipally-owned utilities under section 253(a).

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[66] *Abilene*, 164 F.3d at 52. *See also* Southwestern Bell Sept. 8, 1999 Letter, Attachment at 6 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (stating that legislative history associated with a federal act did not provide plain evidence that Congress intended to abrogate the Eleventh Amendment bar to suits against the states in federal court)).

[67] Missouri Municipals' Reply at 8-9 (citing *Gregory*, 501 U.S. at 467 (citations omitted)).

[68] *Gregory*, 501 U.S. at 467.

19. The Missouri Municipals also ask us to consider the impact of Congress' explicit statement in section 224(a)(1) of the Act that the term "utility," for purposes of pole attachments, does not include entities owned by the state.[69] They argue that Congress affirmatively preserved this state exemption when it amended the definition of "utility" in the 1996 Act, and that the fact that it did not similarly limit the term "entity" in section 253(a) proves that it intended municipalities and municipally-owned utilities to be included within its scope.[70] While we acknowledge that it appears that Congress considered in 1996 whether section 224 of the Act should apply to state-owned utilities, it is not plain, as it needs to be under *Gregory*, that Congress also considered the application of section 253(a) to state or municipally-owned utilities and then unmistakably determined that it would apply to them.

20. We note that if a municipally-owned utility sought to provide telecommunications service or facilities as an independent corporate entity that is separate from the state, we could reach a different result under section 253(a). If the utility were not acting as a political subdivision of the state, then issues of state sovereignty would not prevent the Commission from exercising its authority under section 253 to preempt the enforcement of a statute that prohibited the ability of the utility to provide telecommunications service.

21. We agree with UTC's observation that municipal utilities may have an independent corporate existence and undertake non-governmental, proprietary func-

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[69] Petition at 15-16 (citing 47 U.S.C. § 224(a)(1)).

[70] Petition at 15.

tions,[71] but under Missouri law, it is not clear that a utility can undertake even proprietary functions without authority from the state. In the Texas Preemption Order, the Commission recognized that a municipality may provide telecommunications service as a proprietary function, but stated that it did not interpret section 253 to preclude a state from exercising its authority to restrict the activities of its political subdivisions, regardless of whether such activities are governmental or proprietary in nature. It found that while the provision of telecommunications services by a municipality may be a proprietary function, the provisions of Texas law requiring that the actions of its cities be consistent with state law did not appear to distinguish between proprietary and governmental functions.[72] Similarly, the provisions of Missouri's law

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[71] UTC Comments at 7. UTC refers to the Commission's decision in IT&E Overseas, Inc., in which the Commission found that the Guam Telephone Authority, a public corporation owned by the government of Guam, is separate from the government within the meaning of the Communications Act. 7 FCC Rcd 4023 (1992). This case did not implicate federal preemption of traditional state powers. It involved a circumstance in which Guam was attempting to assert jurisdiction over interstate and foreign carrier communications. To ensure that Guam did not usurp the Commission's exclusive authority to regulate such telecommunications, the Commission construed the term "any corporation" in the Communications Act to include public corporations, such as Guam's publicly-owned telephone company. The Commission explained that this interpretation of the Act was consistent with Congress' clearly expressed intent in 47 U.S.C. § 151 to centralize authority over interstate and foreign communications in one federal agency. *Id.* at 4025, paras. 9-12. By contrast, there is no clear expression of intent in section 253 to authorize federal preemption of state laws governing political subdivisions.

[72] Texas Preemption Order, 11 FCC Rcd at 3547-48, para. 186.

requiring that the actions of its cities be consistent with state law does not appear to distinguish between proprietary and governmental functions.[73] As we indicate above, the municipal entity would therefore have to have an identity that is fully separate from the state in order for the Commission to consider whether or not section 253(a) would be applicable.

22. We also note that HB 620 restricts a political subdivision from providing a telecommunication service for which a certificate of service authority is required, except that it may provide telecommunication service or facilities for "internet-type services." A municipally-owned utility should therefore be able to provide these

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[73] Article 6, § 19(a) of the Missouri Constitution states,

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Mo. Const. art. 6, § 19(a).

Article XI, section 5 of the Texas Constitution states,

> Cities having more than [5000] inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by he Legislature of this State.

Tex. Const. art. XI, § 5.

services in Missouri whether or not it is operating as a political subdivision of the state.[74]

23. Because we do not find that HB 620 violates section 253(a), as it applies to municipalities and municipally-owned utilities, we do not need to reach the issue of whether it falls within the reservation of state authority in section 253(b).

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption filed by the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities on July 8, 1998, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[74] It is not clear to us whether or not a municipally-owned utility would be required to obtain a certificate of service authority to provide internet services in Missouri. A certificate of service authority is required to provide interexchange telecommunications service and local exchange telecommunications service. Mo. Stat. § 392.410(1) and (2). The definition of "telecommunications service" in Missouri's public service commission law does not address internet services specifically. Mo. Rev. Stat. § 386.020(53). "Access to the internet" is not considered a telecommunications service for purposes of the collection of sales tax in Missouri. Mo. Rev. Stat. § 144.010(13)(a).

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD AND COMMISSIONER GLORIA TRISTANI

Re: The Missouri Municipal League: The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, Memorandum Opinion and Order, CC Docket No. 98-122.

We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities. Given this precedent, Section 253(a)'s prohibition on state or local laws that prohibit the ability of "any entity" to provide any interstate or intrastate telecommunications service is not sufficiently clear.

The record in this proceeding contains many letters from Members of Congress that state unequivocally that it was the intent of Congress when it enacted section 253 to enable any entity, regardless of the form of ownership or control, to enter the telecommunications market and that it intended to give the Commission authority to reject any state or local action that

prohibits such entry. We urge Congress to take these views to heart and consider amending the language in section 253(a) to address clearly municipally-owned entities. This would allow the Commission to address the barriers to municipal entry that already exist in several other states, and would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential. We also urge the states, as the Commission has said before, to use safeguards other than an outright ban on entry to address any unfair competitive advantage that they believe a municipally-owned utility may have. The right policy for consumers is to have as many providers of telecommunications from which to choose—barring entry by municipally-owned utilities does not give consumers that choice.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: The Missouri Municipal League: The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, Memorandum Opinion and Order, CC Docket No. 98-122.

I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.

In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions.[75]

Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

I urge states to adopt less restrictive measures, such as separation or nondiscrimination requirements, to protect utility ratepayers or address any perceived unfair competitive advantages. Allowing the competitive marketplace to work will facilitate the type of innovation and investment envisioned by Congress when it enacted the Telecommunications Act. I join with Chairman Kennard and Commissioner Tristani in urging Congress to clarify its intention in section 253

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[75] *See City of Abilene, Texas v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

with respect to prohibitions on entry by municipal utilities.

APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

No. 01-1379

THE MISSOURI MUNICIPAL LEAGUE, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENTS
AND
SOUTHWESTERN BELL TELEPHONE CO., ET AL,
INTERVENORS ON APPEAL

Nov. 20, 2002

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petitions for rehearing en banc are denied. The petition for rehearing by the panel are also denied.

Judge McMillian and Judge Loken took no part in the decision in this matter.

(5128-010199)

Order Enter at the Direction of the Court

/s/ MICHAEL E. GANS
MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

STATUTORY APPENDIX

1. Section 253 of Title 47 of the United States Code provides:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirements that violates subsec-

tion (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

2. Section 392.410.7 of the Missouri Annotated Statutes (West Supp. 2003) provides:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service

authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:

(1) For its own use;

(2) For 911, E-911 or other emergency services;

(3) For medical or educational purposes;

(4) To students by an educational institution; or

(5) Internet-type services.

The provisions of this subsection shall expire on August 28, 2007.